SUPREME COURT OF THE UNITED STATES.

No. 201.

THOMAS G. GAYLORD, JR., AND BENJAMIN GAYLORD, APP'TS,

vs.

JOHN KELSHAW AND CHARLES BUTTERWORTH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden in Indianapolis, in said district, on the tenth day of January, in the year of our Lord one thousand eight hundred and sixty, that being the forty-fourth judicial day of the November term of said court. Present: The honorable Elisha M. Huntington, district judge of the United States for the district of Indiana.

THOMAS G. GAYLORD, sen'r, BENJAMIN GAYLORD, and THOMAS G. GAYLORD, jr., *vs.* JOHN KELSHAW and CHARLES BUTTERWORTH. } In chancery.

Be it remembered that heretofore, to wit, on the eighteenth day of January, in the year of our Lord one thousand eight hundred and fifty-eight, to wit, at the January rules of said court, come now the complainants and file their certain bill of complaint against the defendants, in the words and figures following, to wit:

In the circuit court of the United States, seventh judicial circuit and district of Indiana, May term, one thousand eight hundred and fifty-eight.

To the honorable John McLean, judge of said court, in chancery sitting:

Your orators, Thomas G. Gaylord, sen'r, Thomas G. Gaylord, jr., and Benjamin Gaylord, who are citizens of the State of Ohio,

2 humbly complaining unto your honor that, on the day January, one thousand eight hundred and fifty-six, one John Kelshaw was indebted to your orators in several bills of exchange, before that time accepted by the said Kelshaw; and that afterwards, to wit, on the seventh day of July, one thousand eight hundred and fifty-seven, by the judgment and consideration of the Marion circuit court, in and for the county of Marion, in the State of Indiana, your orators, in a certain action then pending on said bills, recovered against the said John Kelshaw the sum of three thousand nine hundred and sixty-four dollars and eight cents, which said judgment remains in full force unreversed and unforced. And your orators further show to the court that, at the time of the execution of said bills of exchange by the said John Kelshaw, he, the said John, was the owner of the following described premises, situated in the city of Indianapolis, to wit, lot number fourteen in out-lot number twenty-three, in Duncan's subdivision. And your orators further charge the fact to be, that, on the twenty-fifth day of September, one thousand eight hundred and fifty-six, the said John Kelshaw, with the fraudulent intent to cheat, hinder, and delay your orators in the collection of the said bills of exchange, colluded and confederated with one Charles Butterworth, a citizen of the State of Indiana, and who is the son-in-law of the said Kelshaw, for the purpose

of defrauding your orators in the collection of said bill, and
3 for that purpose the said Kelshaw fraudulently deeded the said premises to the said Butterworth without any consideration whatever. Your orators aver that the said Butterworth had no means whatever of his own to pay on said premises, and that he knew, at the time of said conveyance, that the same was fraudulent. Your orators also aver and charge the facts to be that the said Kelshaw is totally insolvent, and that, if the said fraudulent sale is permitted to stand, their debt will be a total loss. Your orators humbly pray that the said Kelshaw and Butterworth be made defendants to this bill, and that they, and each of them, be required to make full, true, and perfect answers to the same, under oath; and that, on the final hearing, will your honor grant and decree that the conveyance so made be set aside and annulled, and that the aforesaid premises be sold to pay your orators' judgment and costs, and grant such other and further relief in the premises as in equity they are entitled.

W. HENDERSON,
Sol. for Compl'ts.

And on their motion subpœna is issued with the following note thereto attached: "The defendants will enter their appearance to the complainants' bill of complaint in the clerk's office of said court on or before the first Monday in March next, or, in default thereof, the same will be taken *pro confesso*.

And afterwards, to wit, at the March rules of said court, to wit, on the second day of March, in the year of our Lord one thou-
4 sand eight hundred and fifty-eight, now come the complainants by their solicitor; and the defendants failing to appear, default is hereby entered, and the bill against them is taken as confessed.

And afterwards, to wit, at the April rules of said court, to wit, on the 5th day of April, in the year last aforesaid, comes now Charles Butterworth, by his solicitors, Ketcham & Coffin, and files his seperate answer to the complainants' bill of complaint in the words and figures, to wit: "And said Charles Butterworth, answering, says he admits that John Kelshaw did convey to him, by deed of the twenty-fifth day of September, one thousand eight hundred and fifty-six, lot number fourteen in out-lot number twenty-three, of Indianapolis, in Duncan's subdivision; but he utterly denies every allegation made in said bill charging that said conveyance was made with the fraudulent intent to cheat, hinder, and delay the complainants in the collection of certain alleged bills of exchange. He also denies that there was any collusion or confederation by said Kelshaw with this defendant for the purpose of defrauding said complainants in the collection of said bills, or for any other purpose. He also denies that said Kelshaw fraudulently deeded the premises to this defendant, without any consideration, as alleged. And, on the contrary of all the
5 charges about fraud, this defendant avers that there was no fraud whatever connected with the sale and conveyance of said premises, or either, but that the whole transaction, from beginning to end, was a fair one, and that this defendant paid to said

Kelshaw for said property its full value, and more than it could at any time since have been sold for.

This defendant further says that the allegation in said bill, that this defendant had no means whatever of his own to pay on said premises, is grattitious and utterly untrue.

This defendant further says that although his deed was made in September, one thousand eight hundred and fifty-six, the purchase money was in fact advanced in the month of April previous, and that the sum advanced was three thousand dollars, actual cash, the money of this defendant, the most of which he brought with him from England; and that when he advanced said money to said Kelshaw, it was by way of a loan, and wholly for the accommodation of said Kelshaw, and the time thereof, it was expressly agreed that said money should be repaid to this defendant, by said Kelshaw, in September following, and on failure so to do, he should convey said premises to this defendant in satisfaction of said debt. And this defendant further says that when said sum become due, according to said arrangement, he required of said Kelshaw to pay the same, or to
6 execute to him a deed for said premises in satisfaction thereof, and that said Kelshaw not having the money, or not choosing to pay this defendant, did then, in pursuance of his said agreement with this defendant, and as he was bound to do, execute and deliver to this defendant said deed for said premises, and gave to this defendant practicable possession thereof.

This defendant also states that at the time of the loan of said money to Kelshaw, in the spring of eighteen hundred and fifty-six, said Kelshaw gave this defendant a written undertaking to repay, or to make said conveyance of said property as above stated, and at that time he did not know, nor had he heard, that said Kelshaw was indebted to said complainants, and never knew anything of the said indebtedness to complainants until after said conveyance to this defendant above stated. He admits that he has since understood that said Kelshaw is indebted to said complainants in some sum, but how much or when contracted is unknown to this defendant. He admits that he is now the son-in-law of said John Kelshaw. And having fully answered the bill, prays to be hence to be dismissed with his costs.

CHARLES BUTTERWORTH.

Charles Butterworth, being sworn before me, a nortary public of Marion county, Indiana, says on oath that the matters set forth in the forgoing answer are true.

CHARLES BUTTERWORTH.

7 Sworn to and subscribed before me. Witness my name and notarial seal this 5th day of April, 1858.

[L. S.] FRANCIS SMITH, *N. P.*

KETCHAM & COFFIN, *Att'ys.*

And the defendants enter their appearance to said bill by their attorneys.

KETCHAM & COFFIN.

And afterwards, to wit, at the May rules of said court, to wit, on the third day of May, in the year aforesaid, come now the complainants and file their replication to the answer of Butterworth, heretofore filed, in the words and figures following, to wit: These replicants, saving and reserving to themselves all manner of advantage which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said Butterworth, for replication thereto, saith that they do and will aver, maintain, and prove their said bill to be true, and that the answer of the said Butterworth is very uncertain, evasive, and insufficient in law to be replied unto by these replicants without that; that any other matter or thing in the said answer contained, motioned, or effectual in law to be replied unto, and herein well, sufficiently replied to, confessed or avoided, traversed or denied, is true; and which matters and things these replicants are ready to aver, maintain, and prove, as this hon-
8 orable court shall direct.

W. HENDERSON, *Sol.*

And afterwards, to wit, on the fifteenth day of May, in the year last aforesaid, come John Kelshaw, by his solicitor, and files his answer herein in the words and figures following, to wit: John Kelshaw answers to the bill of complaint filed herein, and says he admits that he was indebted to complainants by certain acceptances, and that they have taken judgment thereon, as alleged; and he admits that at the time he accepted said bills, to wit, on the days of May and June, eighteen hundred and fifty-six, the legal title to lot fourteen (14) in out-lot twenty-three (23) in Duncan's subdivision, was in this defendant; but he also states, in reference thereto, and to his interest therein, that prior thereto, to wit, in the month of April, one thousand eight hundred and fifty-six, he borrowed of Charles Butterworth, who is also a defendant herein, (and who has since then become the son-in-law of this defendant,) three thousand dollars in cash, to be repaid to said Butterworth in the following September, in the early part thereof. And it was also further agreed in writing, that if this defendant did not pay the same when due, that he should convey to him, the said Butterworth, said lot number fourteen, in fee simple, in satisfaction and discharge of said debt of
9 three thousand dollars for borrowed money, as above stated.

And this defendant further says that said sum of three thousand dollars had become due from him to said Butterworth on and before the date of the deed to said Butterworth, and was on the date of said deed due and owing from this defendant to said Butterworth for said borrowed money; and this defendant says that he was, on the date of said deed, wholly unable to pay said sum of three thousand dollars so due, as above stated, or any considerable part thereof. Having recently sustained heavy losses, he did, in pursuance of said agreement made with said Butterworth at the time of said loan in April previous, execute and deliver to said Butterworth a conveyance in fee simple for said lot, number fourteen, in full payment and satisfaction of said debt of three thousand dollars then due and owing

from this defendant to said Butterworth; and this defendant says that the whole transaction was in good faith and without any fraud whatever, or collusion, and that the sum so paid to him by said Butterworth for said lot was the full value thereof, and this defendant denies all fraud whatever, and says there is no truth whatever in any of the charges of fraud alleged in said complainants' bill.

This defendant admits that he is, at present, unable to pay the judgment against him in favor of said complainants, but hopes to be able at no distant day, and says that but for his losses above stated,

10 he would have been able to have repaid said Butterworth long before this; to have paid complainants also.

JOHN KELSHAW.

KETCHAM & COFFIN,
Solts. for Kelshaw.

THE STATE OF OHIO, *Hamilton County, ss:*

Before me, a notary public of said county, John Kelshaw, the above-named defendant, being duly sworn, says that the foregoing answer, and the matters therein contained, are true in every respect.

JOHN KELSHAW.

Sworn to and subscribed before me. Witness my name and notarial seal at Cincinnati this 13th day of May, A. D. 1858.

[L. S.] GEORGE McLAUGHLIN,
Notary Public, Hamilton Co., Ohio.

And afterwards, to wit, at the May term of said court, begun, holden, and continued before the honorable Elisha M. Huntington, district judge of the United States for the district of Indiana, to wit, on the twenty-ninth day of May, in the year aforesaid, that being the twelfth judicial day of said term, come now the defendants, and on their motion the complainants are ruled to file replication herein, and day is given, &c.

And afterwards, to wit, on the twenty-third day of June, in the year aforesaid, the complainants file their replication in the

11 words following, to wit: And now come the said plaintiffs, and for replication to the answer of the said defendants say that the matters and things alleged in said bill of complaint are true, and that all things alleged in said answers contrary thereto are untrue, and this they are ready to make appear.

W. HENDERSON, *Sol.*

And afterwards, to wit, on the twenty-sixth day of June, in the year aforesaid, that being the thirty-second judicial day of said May term of said court aforesaid, before the honorable judge aforesaid, come now the parties, and by their agreement this suit is continued, with leave to take depositions.

And afterwards, to wit, at the November term of said court, begun, holden, and continued before the honorable Elisha M. Huntington, district judge aforesaid, to wit, on the sixteenth day of Novem-

ber, in the year aforesaid, that being the second judicial day of said term of said court, come the complainants, by their solicitor, and move to suppress the deposition of Kelshaw, herein on file, and day is given.

And afterwards, to wit, on the eighteenth day of November, in the year aforesaid, that being the fourth judicial day of said November term aforesaid, begun and holden before the honorable judge aforesaid, come the complainants, by their solicitor, and on his motion the depositions herein on file are ordered to be published, and day is given, &c.

12 And afterwards, to wit, on the twenty-ninth day of December, in the year aforesaid, that being the 33d judicial day of said term last aforesaid, holden before the honorable judge aforesaid, come the parties, by their attorneys, and this cause is continued, with leave granted to both parties to take depositions.

And afterwards, to wit, at the May term of said court, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and fifty-nine, that being the third judicial day of said term aforesaid, begun, holden, and continued before the honorable Elisha M. Huntington, district judge of the United States for the district of Indiana, come now the parties, and by their agreement this cause is set down for reargument, and day is given the parties, &c.

And afterwards, to wit, on the twenty-first day of June, in the year last aforesaid, that being the twenty-second judicial day of said May term of said court aforesaid, begun and holden before the honorable judge aforesaid, this cause was continued until the next term of this court.

And afterwards, to wit, at the November term of said court, to wit, on the twenty-second day of November, in the year last aforesaid, that being the second judicial day of said term of said court aforesaid, begun, continued, and holden before the honorable

13 Elisha M. Huntington, district judge aforesaid, come the complainants, by William Henderson, esq., their solicitor, and files their motion to suppress the deposition of John Leishman, taken before the U. S. consul at Manchester, England, on the 25th day of October, A. D. 1859, for the following causes, to wit: 1st. Because it does not appear from said consul's certificate that said deponent was sworn. 2d. It does not appear in said certificate by whom said deposition was written. 3d. Said consul's certificate does not show whether the complainants appeared at the taking of said deposition.

Said complainants also move to strike out the answer of the deponant to the 3d and 4th questions, because he merely testifies to facts derived from Defendant Butterworth, and that he did not know independent of the declarations of Butterworth, and day is given, &c.

And afterwards, to wit, on the twenty-sixth day of November, in the year aforesaid, that being the sixth judicial day of said term of said court aforesaid, begun, holden, and continued before the honorable judge aforesaid, come the parties, by counsel, and the court, being sufficiently advised, overrules the motion heretofore made to suppress the deposition of John Leishman, and thereupon the defendant

moves to suppress the answer to cross-interrogatory No. 10, in the same deposition, and day is given, &c.

And afterwards, to wit, on the fifth day of December, in
14 the year last aforesaid, that being the thirteenth judicial day of said November term aforesaid, begun, holden, and continued before the honorable judge aforesaid, come the parties, by counsel, and by agreement this cause is set down for hearing on Wednesday, the 7th inst., upon the bill, answers, replications, and depositions, and day is given, &c.

Which depositions are in the words and figures following, to wit:

The defendants are hereby notified that on the 25th day of August, 1858, between the hours of six o'clock a. m. and 6 o'clock p. m., before William Sullivan, or any other person authorized to take depositions, at his office in the city of Indianapolis, county of Marion, and State of Indiana, the complainant will proceed to take depositions to be read in evidence on the trial of the above-entitled cause, and will continue taking the same from day to day thereafter, between the same hours, until the whole be taken.

Dated August 18, 1858.

W. HENDERSON,
Att'y for Compl'ts.

THOMAS G. GAYLORD *et al.*
vs.
CHARLES BUTTERWORTH *et al.* } In the U. S. court, Nov. T. 1858.

Deposition of T. M. Jennings and others, of the county of Marion and State of Indiana, taken on the 25th day of August, 1858, at the office of William Sullivan, justice of the peace in the city
15 of Indianapolis, pursuant to the enclosed notice, and to be read in evidence on the trial of the above-entitled cause on behalf of the complainants; and on the 25th day of August, 1858, come the parties, by their attorneys, and continue, on account of the absence of the witness, till the 26th of August, 1858, between the hours mentioned in the notice herein.

WILLIAM SULLIVAN, *J. P.* [SEAL.]

And on the 26th day of August, 1858, come the parties, and the witness, and the said Thomas M. Jennings, a witness on the part of the plaintiffs, of lawful age, being first duly sworn, upon his oath answers as follows to the following interrogatories, to wit:

1st. Please state your name and residence.

Answer. My name is Thomas M. Jennings, and I reside in the city of Indianapolis.

2d. State if you are acquainted with the defendants in this case, and particular Mr. C. Butterworth. If so, how long, and when?

Answer. I am acquainted with Charles Butterworth, and have known him since November, 1855. I am not acquainted with the other defendant.

3d. State what Mr. Butterworth's occupation was when you knew

him; and state, if you know, what his pecuniary circumstances were then.

Answer. He made application to me for work, and I supposed he was a journeyman tailor, and I gave him work as a journeyman
16 tailor. I did not know of any other resources he had except that derived from his work at his trade as journeyman tailor.

4th. What, if anything, did you ever hear Mr. Butterworth say about being hard up for money, and about it requiring all he made to support him?

Answer. On one or two occasions I was a little backward in paying him, and he told me he must have the money, for he really needed it, and I got it as soon as I could and paid him; in April 28, 1856, was the last time he told me so, just as he was quitting me, and going to get married, as I understood, and at that time I paid him forty dollars in gold; occasionally since he has worked with me, but not being regularly employed, I did not open an account with him. A good journeyman tailor can make from ten to fourteen dollars per week.

5th. State if you ever saw any evidence of Mr. Butterworth having any money except what you paid him. If so, what was it, and to what amount?

Answer. I never saw any money he had except what I paid him for work?

Cross-examination.

1st. Was Mr. Butterworth a good workman, and industrious and attentive to business?

Answer. He was; I can say that for him.

2d. Was he a prudent and careful man, and economical?

17 Answer. I can make no answer in regard to his economy. He was always careful in regard to his work, and disposed to please.

3d. Do you know whether he worked for anybody else besides yourself?

Answer. Yes; he worked for Mr. Dessar.

4th. Did you know anything about him before you employed him, or about his means?

Answer. No; I did not.

5th. Have you ever taken any steps to learn what means he had, or what he was or is worth?

Answer. None, only by inquiry through himself.

6th. State whether he is not the owner of the house and lot on Delaware street, in Indianapolis, formerly owned by Mr. Kelshaw.

Answer. I learned from Mr. Butterworth that he gave his father-in-law, Mr. Kelshaw, three thousand dollars for that house and lot; this was about one year ago.

THOS. M. JENNINGS.

And Thomas Lally, a witness on the part of the plaintiffs, of lawful age, being first duly sworn, upon his oath answers as follows to the following interrogatories:

1st. State if you know Charles Butterworth, one of the defendants in this case. If so, how long have you known him?

Answer. I have known him about two years. He and I worked for Thomas M. Jennings at the same time.

18 2d. State what his pecuniary resources were when you knew him. Did he have plenty of money, or was he occasionally short? Did he appear to have more money than journeyman tailors usually have?

Answer. He seemed to have plenty of ready money, as much as his circumstances needed; he seemed to have more than men that work on the board generally. I have seen him lend money to men on the board.

3d. What amount did you ever see him have at a time, and how much did you ever know him to lend at a time?

Answer. I have seen lend from a half dollar to a dollar at a time. I never looked into his pocket to see how much he had.

4th. How old was Mr. Butterworth when you knew him, and where did he come from when he came here?

Answer. I don't know what his age was, but I think he was about twenty-eight when I first knew him. He said he came from Connersville to this city.

Cross-examination.

1st. Was not Tom Jennings, for whom you and Charley worked, very slow pay.

Answer. He was short of money sometimes, but he paid me up all he owed me. He was slow, but he was sure.

THOMAS LALLEY.

19 STATE OF INDIANA, *Marion County, ss:*

I, William Sullivan, a justice of the peace in and for the county and State aforesaid, do hereby certify that the above-named Thomas M. Jennings and Thomas Lalley were by me duly sworn to testify the truth, the whole truth, and nothing but the truth, as witnesses in the above-entitled cause, and the depositions by them severally subscribed was reduced to writing by me in the presence of said witnesses, and by them subscribed in my presence, and were taken at the time and place stated in the notice hereto attached, and in the caption and body of those depositions. Both plaintiffs and defendants were present at the taking, by counsel.

Witness my hand and seal this 26th day of August, 1858.

WILLIAM SULLIVAN, *J. P.* [SEAL.]

THOMAS G. GAYLORD *et al.*
vs.
CHARLES BUTTERWORTH *et al.*
} In the U. S. cir. ct., Nov. T. 1858.

The defendants are hereby notified that on the 16th day of September, 1858, between the hours of 6 o'clock a. m. and 6 o'clock p. m.

before or some other person authorized to take depositions, at the law office of B. F. Claypool, in the town of Connersville, county of Fayette and State of Indiana, the complainants will proceed to take depositions to be read in evidence on the trial of the above entitled cause, and will continue taking the same from day to day thereafter between the same hours until the whole be taken.

Dated 7th September, 1858.

W. HENDERSON,
Att'y for Compl't.

Depositions of witnesses taken in the action pending in the United States circuit court wherein Thomas G. Gaylord and others are plaintiffs and Charles Butterworth and others are defendants, for said plaintiffs, at the time and place hereinafter mentioned, and agreeably to the notice hereto attached, where and when B. F. Claypool appeared as attorney for plaintiffs, and Parker and McIntosh for defendants.

September 16, 1858, 7 o'clock a. m., parties appeared by their counsel as aforesaid, when Augustus Knuphlen was sworn as a witness, when this matter was, by agreement of parties, continued until 5 o'clock p. m. of said day.

September 16, 1858, 5 o'clock p. m., parties met, by their attorneys as aforesaid, when Alfred B. Gates was sworn, and testified as follows:

1st. State your age and occupation.

Answer. I am 34 years of age, and a merchant.

2d. State whether you are acquainted with Charles Butterworth. If so, when did you become acquainted with him, and what was
21 his occupation when you knew him, and where did he reside?

Answer. I am acquainted with him; I became acquainted with him in February, 1855. He was a journeyman tailor and worked for our firm; can't say how long; about eight months. He resided in Connersville.

3d. What were his circumstances—his means, pecuniary—when you knew him?

Answer. I don't know of his having a visible property; if he had anything, it was money; I don't know of his having any money, only what we paid him for work. I don't know anything about his condition formerly, when he came to us, more than I stated above.

Cross-examined.

He was industrious, careful, and thrifty, more so than the generality of jir tailors; he was economically.

R. X.

We paid him a small amount of money when he went away which was all he had as far as I know. I don't know the exact amount, but think it was less than one hundred dollars; he may have had more from other sources. Don't know anything about this other than what we paid.

ALFRED B. GATES.

Eber Bateman sworn, says: I am a merchant; have been in business in this place over thirteen years. Am acquainted with Charles Butterworth; became acquainted with him in the spring of
22 1855; he was then a journeyman tailor in the employ of myself and A. B. Gates. I did not know of his having any other money than what we paid him for work, but he might have other money that I know nothing of; he had no other property to my knowledge. I think he worked for us about eight months. He was also here about one month in May and June, 1856; his circumstances then were about the same they were when here in 1855, so far as I know.

Cross-ex.

Know nothing about his circumstances since he left our employ in the fall of 1855. I knew nothing of his financial condition while in our employ further than the money we paid him for work. My impression is that he was a saving, industrious man.

EBER BATEMAN.

Augustus Knuphlen being sworn, says: Am a merchant tailor; live in Connersville; am 33 years old. Know Charles Butterworth; first became acquainted with him in the fall of 1854 at Cincinnati; we both worked in the same shop as journeymen tailors; we roomed together part of the winter of 1854 and '55. In February, 1855, he came to Connersville and engaged to work for Bateman & Gates as a jour. tailor. When in Cincinnati he had some money, can't say how much; he had no other property that I know of. When he started to Connersville from Cincinnati in February, 1855, I loaned him, I
23 think, three dollars; don't know whether he was in need or not; think he asked for the $3 because he left his trunk, containing clothing, with me; don't know whether it contained anything else or not. During the time he was at Connersville, which was from Feb'y, 1855, until the fall of the same year, I knew him; he was then working with Bateman & Gates as a jour. tailor. I also worked with him there at the same time; did not know whether he had any means or not; I know nothing about his means. I have frequently seen him have $40, $50, and $80 at a time; never seen him have more at any one time. I don't know of his having any money on deposit anywhere. He was here in May and June, 1856, say about one month; was here on a visit with his wife, and worked for Bateman & Gates as a jour. tailor during this time; d'ont know of his having any personal or real property; he may have had some and me not know it.

Cross-ex.

He was industrious and economical, the best shopmate that I ever worked with for industry and economy.

A. KNUPHLON.

Sept. 17, 1858. 3 o'clock p. m. of said day parties met at the office of B. F. Claypool. Parke & McIntosh, attorneys, present.

Isaah D. Walker, being first sworn, testifies as follows:

I am twenty-three years of age. Am acquainted with Charles Butterworth; became acquainted with him May 1st, 1856, at Con-
24 nersville, Indiana. I knew him intimately. During the time I knew him, I was clerking for Bateman & Gates at Connersville, and Butterworth was sewing for them on the tailors' board as journeyman tailor. When I knew him he had no personal or real property that I knew anything of. I never heard him pretend or intimate that he had any. All the money that I knew of his having at any time was four dollars, which was the balance due him when he quit working for Bateman & Gates. This was on the 7th day of June, A. D. 1856. I was frequently in the shop where Butterworth, say several times a day for and during and until June 7, 1856, and conversed frequently with him and other hands. I think he was absent from the shop during this time, say about one week. I think he was then at Indianapolis. Butterworth was married when he was here in June, 1856. Think he went to Indianapolis from here in June, 1856.

Cross-ex.

1st. Do you pretend to know anything of his financial condition? Answer. Nothing, only what conclusion I come to from his working, manner of living, and spending money. He was economical, was steady, and industrious.

I. D. WALKER.

Charles C. Tate, being sworn, testifies as follows:

I am 21 years of age. Have lived in Connersville all my life. Am deputy postmaster at present. Knew Charles Butterworth.
25 Think I first became acquainted with him in the spring of 1855. Saw him frequently during that year. Was in company with him as a journeyman. Knew him also in 1856. Think he left here in summer or fall of 1856. I think he was away from this place during the winter of 1855 and '6. Came back in spring of 1856. I was tolerably intimately acquainted with him. I don't know that he had any real or personal property. Don't know of his having any money, only pocket-money. Never heard him say that he had any means. Did not hear him say anything about it one way or another. If he had any real or personal property, I knew nothing about it. While here he was engaged working as a journeyman tailor.

CHAS. C. TATE.

STATE OF INDIANA, *Fayette County, ss:*

I, Gilbert Trusler, a notary public in and for said county, do hereby certify that Alfred B. Gates, Eber Bateman, Augustus Knuphlon, I. D. Walker, and Charles C. Tate, the above-named deponents, were by me first sworn to tell the truth, the whole truth, and nothing but the truth, in the cause now pending in the United States circuit court, wherein Thomas G. Gaylord *et al.* are plaintiffs, and Charles

Butterworth *et al.* are defendants; that the deposition of Alfred B. Gates was all written by myself, that the depositions of the other said witnesses by B. F. Claypool in my presence and under my direc-
tions and at the request of James McIntosh, attorney for the
26 defendants; also the said Butterworth was present when said deposition was written, and that said deponents subscribed their names to their said several depositions after the same had been carefully read over to them by me and the said Claypool, and that Eber Bateman wrote his own depositions and signed the same in my presence, and under my direction; that the defendant was present in person and by his counsel, James McIntosh, at the taking of said depositions; that all of said depositions were taken at B. F. Claypool's law office, in town of Connersville, Fayette county, and State of Indiana, on the 16th and 17th days of September, 1858, between the hours of 6 o'clock a. m. and 6 o'clock p. m., of the 16th and 17th of said days of September, 1858, agreeable in all respects to the annexed notice.

[L. S.] In witness whereof, I have hereunto subscribed my name, and affixed my seal of office, this 17th day of September, 1858.

GILBERT TRUSLER, *N. P.*

CONSULATE OF THE UNITED STATES OF AMERICA,
At Manchester, 25th October, 1859.

Be it known that on the 25th day of October, A. D. one thousand eight hundred and fifty-nine, before me, Duncan Macauley, consul of the U. S. of America for the city of Manchester, county of Lancashire, England, personally appeared at this office, John Leishman,
formerly residing in Manchester, now at Rochdale, in aforesaid
27 county of Lancashire, and being duly sworn, deposes to the following interrogatories:

1st. Are you acquainted with Charles Butterworth, now of the city of Indianapolis, Indiana, but formerly of England?

Answer. Yes; I am acquainted with him.

2d. State whether you were acquainted with him in England, when, and at what particular place or places?

Answer. I knew him first in Manchester, England, for about six months. I removed to Rochdale, where I now live, about twelve miles from Manchester; he followed me to the same place, and in Rochdale I knew him for about six years.

3d. State whether he had any means during your acquaintance with him in these places, and if you knew how he made it.

Answer. When he lived in Manchester his means were small, but it is known to me that before he left Rochdale he had between six and seven hundred pounds sterling in his possession, which he made by betting at horse-races, at York and other places.

4th. State, as near as you can, the amount of money you may have known him to have had at various times, and state about what times.

Answer. I have seen him occasionally with small sums of gold in his hand, but could not swear to the amount; but I know he made six or seven hundred pounds sterling by betts at horse-racing at York,

which information I had distinctly from Mr. Butterworth himself, and I know he could not have made it by his trade or occupation.

5th. State when and as near as you can how Butterworth left England for the United States.

Answer. He left Rochdale by the train on the morning of
28 the 29th of April, 1854, for Canada, as he told me, *via* Liverpool. I heard afterwards that, being disappointed in not getting a vessel at Liverpool, bound for Canada, he took passage in a sailing vessel bound for New York, and afterwards proceeded to Canada.

6th. State whether he had at that time any money, and how much you knew of his bringing to the United States?

Answer. I do not know of any money he had, or how much he took to the United States; I only know of the amount of money he had made by horse-racing, although I have seen occasionally small sums in his possession.

7th. State whether he had any skill in making money, or the reverse; and whether he was prudent and economical and saving, or the reverse. How was it with him?

Answer. I considered him at that time to be prudent, saving, and economical, a fair enough tradesman, and apparently smartish, as it requires skill to make money by horse-racing.

The following are the answers given by John Leishman to the interrogatories propounded by the complainants as cross-interrogatories:

1st. When did Mr. Butterworth sail for the United States?

I know that he left Rochdale on the 29th April, 1854, and he told me on the morning he left that he was going to Canada.

2d. What was his age when he sailed?

29 Answer. About twenty-four or twenty-five years of age.

3d. What was his occupation?

Answer. A tailor.

4th. From what port did he take passage for the United States?

Answer. From Liverpool, I believe.

5th. How long before his sailing did you last see him?

I did not accompany him to Liverpool, but I beleive he sailed from that port on the 2d of May, 1854, having left Rochdale, where I saw him, on the morning of the 29th April, 1854, which would be three days.

6th. Did he exhibit his money to you, and if so, was it in coin, or in a draft? If in a draft by whom was it drawn, and upon whom?

Answer. Mr. Butterworth never exhibited the bulk of his money to me. I have seen a few gold coins only in his hands; and he never exhibited to me a draft drawn on any one.

7th. If he did exhibit his money to you, why did he do so?

Answer. Had he exhibited the bulk of his money to me, which he did not, I would have attributed it to our intimacy as friends and companions.

8th. Are you a relative of Mr. Butterworth?

Answer. I am no relative.

9th. What was the name of the vessel Mr. Butterworth sailed in for the United States?

Answer. I heard the name, but am not able to recollect it, paying little attention at the time.

10th. Do you know from your own knowledge the amount of money Mr. Butterworth brought to the United States with him, and the manner of his getting it, or did you derive your information from other persons, or from Mr. Butterworth?

Answer. I got no information about Mr. Butterworth from
30 other persons. He told me himself that he made between six and seven hundred pounds sterling by betting at horse-races at York and other places.

11th. Have you had any communication with Mr. Butterworth, or any other person, about your information on this subject? and if, state what communication passed and with whom.

Answer. I have had no communication with any person on this subject, nor with Mr. Butterworth.

12th. Please give the size, height, complexion, and general appearance of Mr. Butterworth.

Answer. He is short in statute, about five feet 4 inches in height, fair complexion, sandy hair, no whiskers at the time I last saw him, and rather smartish in appearance.

13th. What is your age, size, height, and complexion?

Answer. I am 29 years of age on the 29th of March, 1860, five feet eight and a half inches in height, rather stout and well built, fair complexion, and wore large whiskers when Butterworth left England.

In testimony that the above and forgoing deposition of John Leishman was made in this office, on the 25th day of October, 1859,
[L. S.] and in the 84th year of the independence of the United States of America, I have hereto subscribed my name and affixed my seal of office.

DUNCAN MACAULEY, *U. S. Consul.*

And afterwards, to wit, on the tenth day of January, in the year of our Lord one thousand eight hundred and sixty, that being
31 the forty-fourth judicial day of said November term of said court, begun, holden, and continued, before the honorable judge aforesaid, come the parties, by counsel, and the court being sufficiently advised in the premises, find that the matters set forth in said bill are not true in manner and form as therein set forth.

It is therefore ordered, adjudged, and decreed by the court, now here, that said defendants go hence and recover of said complainants their costs and charges by them in this behalf expended. And thereupon said complainants pray an appeal to the Supreme Court of the United States. And day is given, &c.

And afterwards, to wit, on the tenth day of February, in the year last aforesaid, come the complainants, by counsel, and file their appeal bond, in these words, to wit:

Know ye that we, Thomas G. Gaylord, jr., and Benjamin B. Gaylord, as principal, and Edward B. Howells and William Henderson, as security, are held and firmly bound unto John Kelshaw and Charles Butterworth in the penal sum of three hundred dollars, for the pay-

ment whereof, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally. Sealed and dated this 8th day of February, 1860.

Whereas the above-bound Thomas G. Gaylord, jr., Benjamin B. Gaylord, and one Thomas G. Gaylord, sen., now deceased,
32 were prosecuting their certain chancery suit in the United States circuit court for the district of Indiana against the above-named John Kelshaw and Charles Butterworth, which was decided by said court against the said complainants therein, from which the said Thomas G. Gaylord, jr., and Benjamin B. Gaylord have appealed to the Supreme Court of the United States: Now the condition of the forgoing obligation is such that if the above-named appelants will prosecute their said appeal to effect, and pay all costs and damages that may be awarded against them, then this obligation shall be void; otherwise to remain in full force and effect.

T. G. GAYLORD. [SEAL.]
BENJ. B. GAYLORD. [SEAL.]
EDW'D B. HOWELLS. [SEAL.]
WILLIAM HENDERSON. [SEAL.]

Approved February 10, 1860.

H. BASSETT, *Clerk*,
Per JNO. H. REA.

33 THE UNITED STATES OF AMERICA,
District of Indiana, ss:

I, Horace Bassett, clerk of said court, do hereby certify the above and foregoing to be a true, correct, and complete transcript of a record now in my office in the foregoing-entitled cause.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court, at Indianapolis, this 20th day of February, A. D. 1860.

H. BASSETT, *Clerk*.

Filed May 13, 1862.

IN THE SUPREME COURT

OF THE

UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
FOR THE DISTRICT OF INDIANA,

DECEMBER TERM, A. D. 1862.

THOMAS G. GAYLORD, SEN.,
BENJAMIN GAYLORD, AND
THOMAS G. GAYLORD, JR.,
vs.
JOHN KELSHAW, AND
CHARLES BUTTERWORTH.

ABSTRACT AND BRIEF.

INDIANAPOLIS:
ELDER, HARKNESS & BINGHAM, PRINTERS.

1862.

573

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1862.

THOMAS G. GAYLORD, SEN., BENJAMIN GAYLORD, AND THOMAS G. GAYLORD, JR.,

vs.

JOHN KELSHAW AND CHARLES BUTTERWORTH.

ABSTRACT AND BRIEF.

APPEAL from the United States Circuit Court for the District of Indiana.

The complainants filed their bill in chancery against the defendants on the 18th day of January, 1858. The bill alleges that in January, 1856, the defendant, John Kelshaw, was indebted to the complainants by several bills of exchange; that on the 7th day of July, 1857, the complainants recovered in one of the State Courts of Indiana a judgment on said bills against the said Kelshaw for the sum of 3,964 dollars and 8 cents; that at the time of the accepting of said bills, the said Kelshaw was the owner of a valuable house and lot, in the city of Indianapolis; and that on the 25th day of September, 1856, the said Kelshaw, with the fraudulent intent to cheat, hinder, and delay the complainants in the collection of said bills of exchange, confederated with the said Butterworth, who is the son-in-law of Kelshaw, for the purpose of defrauding complainants in the collection of said bills, and for that purpose Kelshaw fraudulently deeded said house and lot to the said Butterworth without consideration. The bill charges that Butterworth had no means to buy and pay for said property; that he knew at the time of said conveyance that the same was fraudulent; The

bill charges that Kelshaw, the fraudulent grantor, is totally insolvent, and that if said conveyance is permitted to stand, complainants debt would be a loss. The bill prays that the conveyance may be decreed fraudulent and void, and the premises sold to pay the complainants judgment.

DEFENDANTS ANSWERS.

The defendants file separate answers to the bill. Butterworth's answer admits that the conveyance was made to him on the day named in the bill, and that he is the son-in-law of the said Kelshaw; but denies all fraud and knowledge of the indebtedness to complainants, and alleges that although the deed was made on the day named in the bill, yet, in fact, the consideration, three thousand dollars, was paid the April previous in a loan of three thousand dollars in cash to Kelshaw; that at that time he took an agreement in writing from Kelshaw, agreeing to convey him the property if the money was not paid, and in pursuance to this agreement the deed was executed.

Kelshaw's answer admits the indebtedness and the rendition of the judgment, &c.; he also admits that at the time of the contracting of said indebtedness, he was the owner of the property in controversy, and that he is now insolvent. His answer also alleges that he borrowed 3,000 dollars from Butterworth in April, 1856, and agreed that if he could not pay him at maturity, he would convey him said house, and that on the maturity of said loan he found himself unable to repay the same, and conveyed said house and lot in good faith to the said Butterworth.

REPLICATIONS.

To both the answers of the defendants the complainants filed general replications, denying the facts stated in the answers, and offering to prove the facts stated in the bill.

COMPLAINANTS DEPOSITIONS.

Thomas M. Jennings, one of the complainants' witnesses, testifies that he has known the defendant, Butterworth, since November, 1855; that about that time he made application to him for work as a *journeyman tailor*, and that he gave him work as such

tailor; that he knew of no means he had except what he derived from his work as such journeyman. This witness says, that on one or two occasions he was a little backward in paying Butterworth, when B. told him he must have the money, for he "*really needed it.*" Witness says, I got the money, and paid him 40 dollars. That was on the 28th of April, 1856.

Thomas Lacy, another witness, who worked with him as a journeyman tailor, while he worked for Jennings, says that Butterworth seemed to have as much money "as his circumstances needed;" that he seemed to have more than men usually do who work on the board; that he "has seen him have from a half dollar to a dollar at a time."

Alfred B. Gates is next introduced by complainants. This witness says he became acquainted with defendant, Butterworth, in February, 1855, at which time witness hired defendant, B., to work for him as a *journeyman tailor;* that he did not know of Butterworth having any visible property; that he did not know of his having any money only what he paid him for work; that when defendant left his employment he paid him a small amount of money, less than one hundred dollars.

Eben Boleman says he is a merchant tailor; that in the Spring of 1855 he became acquainted with Butterworth, who was then a journeyman tailor in the employment of himself and Gates; that he did not know of his having any money except what they paid him for work; that he might have had money that he knew nothing about; that he worked for him about eight months. He says Butterworth was absent awhile, and returned and worked for them about one month in May and June, 1856; that his circumstances were about the same then as they were in 1855.

Augustus Knaphlow, a merchant tailor of Connersville, Indiana, is the complainants next witness. He says he first became acquainted with Butterworth at Cincinnati in the fall of 1854; that they both worked in the same shop, and *roomed together* during a part of the winter of 1854 and 1855; when in Cincinnati he had some money, but witness did not know how much; he had no other property to witness' knowledge. Witness says when he started to Connersville from Cincinnati in February, 1855, I *loaned* (I think) *three dollars*, but did not know whether he was in need or not; think he asked for the three dollars "because he left his trunk, containing clothing, with me;" did not know that it con-

tained anything else; had seen him in Connersville have from 40 to 80 dollars; never knew of his having any money on deposit.

Isaiah D. Walker, the next witness examined by the complainants, says he became acquainted with defendant, Butterworth, 1st of May, 1856, at Connersville, Indiana; says he knew him *intimately;* witness was clerking in the clothing house in which defendant was at work as a journeyman tailor. Witness says when he knew him he had no personal or real property that he knew of; that he never heard him "*pretend or intimate that* he had any; all the money he ever knew him to have was four dollars, of a balance due him when he quit work for Boleman & Gates, on the 7th of June, 1856. Witness says he was familiar with and talked to the defendant frequently.

DEFENDANTS TESTIMONY.

The defendant, Butterworth, being an Englishman by birth, the defendants took the testimony of one John Lushman, at Manchester, England, for the purpose of showing that the defendant, Butterworth, brought a large amount of money to this country with him. This witness says, when B. lived in "Manchester his *means were small;*" but that it was known to him that before he left Rochdale he had between six and seven hundred pounds sterling, which he made by *betting* on horse races at York and other places; that he had seen him occasionally with *small sums* of gold, but could not swear to the amount. And the witness adds, "but I know he made six or seven hundred pounds sterling by betting at horse racing at York, which information I had *directly from Butterworth himself,* and I know he could *not* have made it by his trade or occupation." Witness says in answer to the sixth question, "I do not know of any money he had or how much he took to the United States with him," he only knew of the amount he made at horse-racing.

In answer to the tenth cross interrogatory witness says, "I got no information about Mr. Butterworth from other persons, he told me *himself* that he made between six and seven hundred pounds sterling by betting at horse racing at York and other places."

The complainants made a motion in the Circuit Court to suppress the deposition of John Leshman, taken before the United States Consul at Manchester, for the following causes, to-wit:

1st. Because it does not appear from said Consul's certificate that the deponent was sworn.

2d. It does not appear in said certificate by whom said deposition was written.

3d. It does not appear from said certificate whether the complainant appeared at the taking of said deposition or not.

The complainants also filed a motion to strike out of said deposition the answer of the said deponent to the third and fourth interrogatories of the defendants, because the deponent merely testified to facts derived from the defendant, Butterworth, and that he did not know to be the fact independant of the declarations of Butterworth. Both these motions the Court overruled.

This being all and the only evidence given in the case, the Court dismissed the bill, and the complainants appealed to this Court.

The complainants make three points in this case against the finding and rulings of the Circuit Court:

I. The Court should have sustained complainants motion to suppress the deposition of John Leshman, taken in Manchester, England.

II. The Court should have sustained the complainants motion to suppress the answer of Leshman to the third and fourth questions of the same deposition.

III. The Court should, under the evidence and pleadings, have decreed for the complainants.

1st. The deposition of Leshman was taken under the laws of the State of Indiana, but does not conform to the statute of that State, which points out the manner of taking depositions. The 256th section, page 87, volume 2, statutes of 1852, provides, "That depositions shall be written down by the officer, or by the deponent, or by some disinterested person in the presence, and under the direction of, the officer, and after the same has been carefully read to or by the deponent, it shall be *subscribed* by him."

This deposition was *not subscribed* by the deponent, and is, therefore, no deposition at all.

The 257th section of the same statute, page 87, provides, "The officer shall annex a certificate to the deposition, stating the following facts: *First*, the deponent was sworn according to law. *Second*, whether or not the adverse party attended."

2d. Now, this deposition nowhere shows these essential statutory requirements, and our motion to suppress should have been sustained. So should our motion to suppress the answer of the same witness

to the third and fourth interrogataries of the complainants; his answer distinctly and unequivocally disavows any knowledge of the facts about which he was testifying, and says that he derived his information as to the defendant's means from the defendant and *no one else.* For the defendants to try to make out their case by their own declarations, is a violation of the first principles of evidence that the law student learns. It cannot be said that by the laws of Indiana parties could testify in their own behalf, and that, therefore, they were entitled to their own declarations, for that was *not* the law of the State then, and if it had been it would have been unnecessary for the defendants to send to England to take the testimony of Leshman, because the defendant cauld have testified in person.

3d. The most important point, however, for the complainants is: Were the complainants entitled to a decree under the pleadings and evidence?

We assert that they were. The bill alleges that the conveyance of the house and lot was voluntary and without consideration. The answers under oath assert that a consideration of 3,000 dollars was paid. It is admitted that the indebtedness existed at the time of the conveyance. Is the evidence on the record not amply sufficient to convince the Court that it was next to morally impossible for Butterworth, the grantee, to have paid the 3,000 dollars.

His own witness, Leshman, swears that he "could *not have made* it by his trade or occupation;" that when "he lived in Manchester his means were small." He does not pretend that he made his 3,000 dollars after he came to the United States, because he says in his answer that he brought his money from England. He came to the United States in 1854; the witness Knaphlow says that he worked with him in Cincinnati in 1854 and part of 1855, and that they roomed together part of the same time, and that he never knew of his having any money; that when he left Cincinnati for Connersville, witness loaned him three dollars, and he left his trunk with him, and the inference is reasonable that the trunk was left as a pledge for the three dollars. If Butterworth had 3,000 dollars in money, why was it necessary for him to borrow three dollars to take him to Connersville? Is it likely that he borrowed *three* dollars to take him from Cincinnati to Connersville, and left, as a pledge for its repayment, a trunk with 3,000 dollars in it? If it was not in the trunk, it must have been in the keeping of some one by whom he could have proved the fact; and as this is a family transaction,

a transaction between father-in-law and son-in-law, we insist that the defendant should make proof of his ability to pay so large a sum of money. This is not all we show by the principals for whom he worked at Connersville, by their clerks and other journeyman tailors, that they were familiar with him, and they never knew of his having any more money than his wages, nor did they know of or ever hear him pretend to have any property, either real or personal.

Again, we prove by Jennings, for whom he worked at Indianapolis, that he never knew of his having any money but what he earned as a journeyman tailor; and that, Mr. Jennings says, that when he was slow in paying him a time or two, Butterworth pressed him for the money, and told him that "he actually needed it."

The case of Franks *v.* Brown, 2 Blackford, 295, was a proceeding to set aside a conveyance as fraudulent. The defendants answered, under *oath*, insisting that the conveyance to Franks, the fraudulent grantee, was *bona fide*. Yet the Supreme Court of Indiana held the conveyance fraudulent, principally because "Under the circumstances without being able, in the opinion of his neighbors, to purchase any real estate in addition to the small tract on which he lived."

In Hildreth *v.* Sands and others, 2 Johnson Chy. Reports, page 35, it is decided: "Fraud may be inferred from circumstances, such as the want of proof of any price having been actually paid." In delivering the opinion in this case the Chancellor says: "The whole of this account of payment of a part of the consideration * * * * is lame and defective, and ought to have been supported by evidence, and not left to rest upon the allegations in the answer."

In Obenheimer *v.* Hanson, 4 McLean's R. 437, it is decided, that circumstances are sometimes strong enough to stanp the transaction with fraud, although against the oaths of the parties concerned.

The only conclusion that can be arrived at from a perusal of the depositions in the case is, that the conveyance from Kelshaw to Butterworth was made without any consideration being paid. Conveyances under such circumstances have ben held fraudulent as often as they have been brought before the Courts. This case has every badge of fraud known to the books.

1st. It is made by a party who was at the time in failing circumstances, if not insolvent.

2d. It was made just on the eve of the bringing our action against him.

3d. The conveyance was a family transaction.

4th. The vendee was insolvent; had nothing, according to the testimony, out of which he could have paid the purchase money.

For the foregoing reasons the complainants ask a reversal of the decree.

WM. HENDERSON,
Solicitor for Complainants.

GAYLORD & OTHERS, vs. KELSHAW & BUTTERWORTH. } Appeal from 7th Circuit.

The Bill prays that the conveyance by Kelshaw to Butterworth may be set aside, and the lot subjected to sale, for the satisfaction of complainants' judgment against *Kelshaw*, on the *charge* that the conveyance was fraudulent, without consideration, and to cheat the complainants; Butterworth confederating with Kelshaw for that purpose.

The answers are precisely *responsive* to the Bill, and state that the conveyance to Butterworth, in September, 1856, was not only fair, and free from fraud, but was made in pursuance of a written agreement, of April previous, made on a loan of $3,000 by Butterworth to Kelshaw—Kelshaw being, at the time of the conveyance, unable to repay said loan. Butterworth further denies all knowledge of Kelshaw's indebtedness to complainants.

Butterworth, the owner of the property, took the deposition of Kelshaw, proving the same things alleged in the answers. But it was suppressed on the ground that Kelshaw's *answer* availed in the case.

The case, then, stands with the answers of both defendants precisely contradicting complainants' Bill, in every point material to Butterworth's defence.

What must be the strength of the complainants' proof to make out their case?

I answer, it must be at least equal to *two* witnesses, and corroborating circumstances equal to a third. That is, Butterworth's answer, being responsive to the Bill, can be overcome only by two witnesses, or one, and corroborating circumstances equal to another witness. (2 Story's Eq., sec. 1528; Smith vs. Brush, 2 Johns Ch. R., 460.) To which is added Kelshaw's answer, which, if it is not to be regarded as of equal weight, (why should it not be?) is at least of the same weight as a deposition. Both defendants answer that Butterworth advanced the $3,000 in April, 1856, fifteen months before the complainants' judgment against Kelshaw. And Butterworth answers that he had no knowledge whatever of Kelshaw's indebtedness to the complainants.

What is it, then, that the complainants must prove by two witnesses and corroborating circumstances? It is that the conveyance was made to Butterworth *fraudulently, without consider-*

ation, to *cheat, hinder* and *delay* the complainants in the collection of their debt.

The complainants attempt no proof of actual fraud; but rely upon inferential fraud, resulting from the conveyance, made without consideration, *as they allege*, and made to cheat, hinder and delay complainants. Butterworth answers that he knew nothing of any indebtedness from Kelshaw to complainants; and therefore he could have had no such fraudulent intent—and the complainants offer no proof on this point. The only point, then, left for proof is, was the conveyance without consideration? *This* the complainants *aver*, and must prove by two witnesses and corroborating circumstances to overcome the defendants' answer. But the complainants fail to make *any positive* proof. No witness swears that the conveyance was without consideration. None of them swear anything about it. They know nothing.

But complainants attempt to prove that Butterworth had no means—that he was only a *journeyman tailor*, and *therefore* could not have $3,000.

But the utmost to which the complainants' proof extends, in this respect, is, that "they did not *know* of any means had by Butterworth." But the Court will see that so far from raising any implication against Butterworth's ability to pay $3,000, the whole proof looks the other way. True, Tom Jennings swears that Butterworth dunned him saying "he really needed it." But he admits that he "was a little backward in paying him." Thomas Lally, the next witness of complainants, testifies that Tom was "slow pay." So that it is fair to suppose that Butterworth represented his "need" only as a means of getting his pay from his "slow" creditor. Jennings was then owing $40, which the defendant got in *gold*.

Knophlaw, another of complainants' witnesses, testifies that he "has frequently seen him have $40, $50 and $80 at a time." Gates, complainants' witness, says, they (Gates & Bateman) "paid him a *small* amount—$100—*when he went away*," as if they had paid him larger sums before, so that the Court can see that Butterworth, when he left his employers, generally had handsome sums coming to him—$40, $50; $80, $100. No witness has shown that he *knew* anything about Butterworth's means. They all speak well of him, as an industrious, careful, economical man, and a good workman. Knophlaw, who loaned him $3, says, "he was the best shopmate I ever worked with for industry and economy." Jennings says that he was a good workman, and

that a good workman could make $10 to $14 per week—$600 to $700 per annum.

All the complainants' evidence goes to prove that B. must have had considerable money at all times. The circumstance that Knophlaw *loaned* him $3 amounts to nothing. His money may have been loaned out, not at hand at the moment he needed $3. Men of wealth sometimes need small sums not at hand at the moment wanted. It is not stated that his trunk was left in *pledge* for the $3. And no such inference can be fairly made. His character generally, and especially with Knophlaw, forbids it.

But we prove by Leishman that B. was a sharp, thrifty fellow, and that he knew of his making a large amount by betting on horse racing. The precise *amount*, or near it, he got from B. But he knew, of his own knowledge, of the fact that he was a successful better. Of course I have nothing to say in defence of betting. But that is not material to our case. The question is, did he furnish Kelshaw $3,000? No matter if he *stole* it. Who was present to witness the transaction, and testify that no money passed? The defendants both swear positively that the money was furnished—was furnished in the spring of 1856—fifteen months before complainants' judgments against Kelshaw. For aught that appears in the case, Kelshaw was then in good circumstances. At all events there is nothing warranting an implication of *fraud* and *perjury* in both these men, both of which exist if Butterworth did not furnish the money.

But the character given to Butterworth by all *complainants'* witnesses forbids any such conclusions. *They* show him industrious, careful, thrifty, economical, capable of making $10 to $14 per week; with considerable sums of money at all times; always closing his engagements with his employers in his debt.

The "badges" of fraud suggested by complainants do not exist.

1st. It does not appear that K. was in "failing circumstances" when the money was loaned—April, 1856—nor when conveyance made, September, 1856.

2d. Neither of these facts transpired "on the eve of complainants' suits." That was July, 1857, in that disastrous year that carried down many a good man.

3d. The "conveyance a family transaction."

If one *must* borrow, to whom shall he go? To a relative, or a stranger? (Though I believe the record shows that B. was not yet a son-in-law.)

4th. The charge of "insolvency" on B. is not only not sustained,

but his own answer, under oath, is strengthened by every witness in the case. Ours is a very different case from any cited by complainants. None of complainants' witnesses pretend to say Butterworth had not means—they only say they *knew of none*. But in the case of Frakes vs. Brown, 2 Blackford's Ind. Reports, 295, (see p. 300) "there is positive evidence that Frakes is not a purchaser for valuable consideration, nor bona fide." And moreover, the circumstances of the case were conclusive against Frakes.

The cases in 2d Johns Ch. R. 35, and 4 McLean, were rightly decided, but are not like our case in any respect.

The complainants object to the ruling of the Court on the motion to suppress Leishman's deposition. But we reply—1st. The deposition is not at all necessary to our defence; and 2d, the ruling was right. It *does* appear that the witness was properly sworn. (See the caption.)

It was not necessary that the consul's certificate should state anything about who wrote the deposition, nor the presence of either party. It was not taken under the Indiana Statute, but under the Rules of this Court on "interrogatories and cross-interrogateries," filed in the Clerk's office. And therefore, the Court properly overruled the motion to suppress.

The motion to suppress the answers to the 3d and 4th questions was waived by setting down the case for hearing without the ruling of the Court on the motion. Besides, there was nothing in the motion.

The objection made, that the deposition was not signed, comes too late. No such objection was made in the Court below. And there is, moreover, nothing in the objection. The *fact* which the Court wish to known is, that the paper offered is the *deposition* of the witness. This appears from the certificate of the officer rather than from the signature of the witness. The signature is *proper*, but not at all *necessary*.

The points I make are—

1. The answers of defendants are responsive to the Bill—directly contradicting it in every material point—and that complainants have not made out any case, unless their proof is equal to two witnesses positively proving the bill, and corroborating circumstances equal to a third.

2. That so far from making such proof, they prove nothing; but all their depositions go to strengthen defendants' answers. There is, therefore, not the shadow of a case for complainants.

JOHN L. KETCHAM, Sol. for Defts.